IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.469 OF 2006

AND

COURT RECEIVER REPORT NO.186 OF 2006

IN

ARBITRATION PETITION NO.359 OF 2006

...

Shri Harilal Savji Patel (H.U.F.)...Petitioners

v/s.

M/s.Choice Centre & Ors. ...Respondents

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Mr.Milind Vasudeo i/b Ms.Suman Jain for the Petitioners.

Mr.H.G.Thakkar with Mr.T.G.Vora i/b Rajesh Singh for Respondent No.6.

Mr.Girish Desai i/b Bharat Joshi for Respondents Nos. 1 to 5.

Mr.D.V.Deokar, 1st asst. to Court Receiver is present.

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CORAM: D.K.DESHMUKH, J.

DATED: 20TH DECEMBER,2006

P.C.:

1. The facts that are relevant and material for making the order that I propose to make are as under:

. A partnership firm by name M/s.Choice Centre- the Respondent No.1, had the Petitioner, Respondent No.2, Respondent No.3, Respondent No.4 and Respondent No.5 as partners. The partnership was at will. That firm was carrying on business at the premises which were taken on leave and licence by the firm from the landlord. A dispute arose between the parties. The partnership deed had an arbitration clause. Therefore, Arbitration Petition No.359 of 2006 was taken out. That petition was disposed by an order dated 29-8-2006. That petition was filed by the present petitioner. In that petition a stand was taken on behalf of the other party that the licence of the premises from where the partnership was carrying on business has been surrendered to the

landlord and that the landlord has granted licence of those premises to present Respondent No.6 M/s.Lasa and that the partnership has also transferred its stock in trade and other assets to the Respondent No.6. By the order dated 29-8-2006 the court recorded a finding that the partnership deed does not authorise any one partner to deal with the property of the firm without other partners consenting to the same. It was also observed that it appears that some of the partners in order to create difficulty in the way of the Petitioner have entered into the transaction of surrendering of licence and transferring of stock in trade. The court also recorded a finding that surrender of licence of the premises only by one of the partners is unauthorised. The court appointed the Receiver of the business of the Respondent No.1 firm and the Receiver was directed to take possession of the business and the assets of the firm from whomsoever found in possession and then provision was made for appointment of the agent. This order was not challenged by any of the partners of the firm, but was challenged only by Respondent No.6 in Appeal. That was Appeal No.739 of 2006. The Appeal was dismissed by the Division Bench with some

clarification.

3. The Receiver has submitted the report. From the report it is apparent that there was initially some resistance from the Respondent No.6 in handing over possession of the moveable assets of the firm. It appears that some of the assets have been handed over and that the Receiver is in the process of ascertaining as to what are the assets of the firm on the basis of the balance sheet of the firm and other documents of the firm. The Receiver is not seeking any order in so far as that aspect of the matter is concerned. It appears from the report of the Receiver that there is some confusion in the mind of the Receiver as to whether because of the orders passed by this court and the Appeal Court, the Receiver has to take possession of the premises from where the business of the firm was being carried on.

4. The Petitioner has taken out this petition basically for directions to the Receiver to implement the order passed by this court. The Petitioner has also sought an order for institution of proceedings for alleged disobedience of the order passed by this court against the Respondents.

5. From the report of the Receiver it appears that there was some resistance on the part of the Respondent No.6 in handing over assets of the firm. It appears that the Receiver is going on with ascertaining what are the assets of the firm. From the report at this juncture at least a conclusion cannot be drawn that the order of this court has been disobeyed. Therefore, in my opinion, at this juncture it will not be appropriate to initiate any action for contempt. From the report of the Receiver and from the contents of the petition and the reply that is filed in this petition, it is clear that a clear direction is required to be issued to the Receiver as to whether the Receiver is to take possession of the premises from where the business of the firm was being carried on. According to the Petitioner, there is no dispute that the premises were taken on licence by the firm for carrying on its business. Therefore, the premises were the property of the firm. It is submitted that even the agreement which is produced on record with the reply whereby the premises are supposed to have been surrendered to the landlord shows that the agreement has been signed on behalf of the firm, thereby conceding the position

that it was the firm which was the licensee. It is further submitted that there is a clear finding recorded by this court in the order dated 29-8-2006 that the surrender of the licence is invalid and unauthorised. It is submitted that if the surrender of the licence was invalid and unauthorised then obviously the licence granted by the landlord of the same premises in favour of the Respondent No.6 cannot be valid and therefore, it is submitted that if the surrender of the licence is unauthorised, the licensed premises continued to be the property of the firm and therefore, the asset of the firm, and therefore, in terms of the order of this court the Receiver has to take possession of that assets also.

6. On behalf of the Respondents Nos.1 to 5, who are partners of the firm, it is submitted that this court has already recorded a finding that the surrender of the licence only by one of the partner is unauthorised. They have not challenged that finding.

7. Petition has been mainly resisted by the Respondent No.6.

8. Firstly, it is submitted that the licence

premises were not the asset of the firm, because in the balance sheet of the firm, it is not shown as assets of the firm. Then it was submitted, relying on clause 21 of the Partnership Deed that even if one of the partner could not have surrendered the licence. The consequence of partner committing breach of that obligation is that that partner becomes liable to indemnify the other partners. The conduct of the partners of surrendering the licence does not become invalid. Then it was contended that under Section 9 of the Arbitration Act this court cannot issue direction against the third party. It is further submitted relying on the judgment of the Supreme Court in the case of Anthony C. Leo v/s. Nandalal Bal Krishnan , AIR 1997 SC 173 that in terms of the provisions of Order 40 Rule 1 the rights and obligations of third party in respect of property under custodia legis remain unaffected.

9. Now, so far as first order dated 29-8-2006 is concerned, it is paragraph 4 of that order which is relevant. Paragraph 4 reads as under:-

> 4. A perusal of the partnership deed on record does not show that any one of the

partners has been given any authority to deal with the property on behalf of the firm without other partners joining. It appears that other partners of the firm, in order to create difficulty in the way of the petitioner, have entered into the transaction. Therefore, in my view, considering that the partnership is at will and it has been dissolved, it is appropriate to appoint a receiver on the business of the firm. Respondent No.6, who is a partner of the firm, says that S.A. Patel was given licence of the furniture of the firm. There is no dispute that S.A. Patel is a son of the respondent No.5, who has signed the documents on behalf of the firm. It appears that any transactions that have been entered into on behalf of the firm i.e. respondent No.6 are invalid and without authority because there does not appear any clause in the partnership deed which authorises any one partner to deal with the property.

10. Perusal of this paragraph shows that in this paragraph it has been clearly held (i) that according

to partnership deed, one partner cannot dispose of the property of the firm without other partners consenting; (ii) that one partner has entered into the transaction of surrender of licence and creation of licence in order to create difficulty in the way of the Petitioner; (iii) that the transactions that have been entered into on behalf of the firm with the Respondent No.6 are invalid and without authority.

11. It is thus implicit in this order that the surrender of licence by one of the partners is unauthorised. Perusal of the order of Appeal Court where this order was challenged shows that that order was challenged only by present Respondent No.6 and he was challenging the directions given by the court to the Receiver to take possession of the business and the assets of the firm from whosoever found in possession. It means that the Respondent No.6 clearly understood the order passed by this court to mean that the Receiver is to take possession of the assets of the firm and the business from him and therefore, he challenged that order. The Division Bench, thereafter, deals with several judgment which were relied on on behalf of the Respondent No.6. Paragraph 12 of the Appellate Court’s order is

deciding paragraph. It reads as under:-

> 12. Though the senior counsel for the appellants argued at quite some length and cited the afore-referred judgments in support of the appellants' case that in the dispute between the parties to the partnership agreement, no order could have been passed against the third party(the appellants) affecting their rights under the independent licence agreements, we are of the view that looking to the order that has been passed by the learned Single Judge, detailed discussion in this regard is not necessary. By the impugned order, the learned single Judge has ordered appointment of the Receiver in respect of the business of the respondent No.2 firm. Obviously, the appellants cannot have any objection to this order. The appellants are not concerned with the business of the firm. The appointment of the Receiver is in respect of the respondent No.2 firm which, by no stretch of imagination, can be said to be affecting the rights of the appellants. The appellants have no concern whatsoever in the

business of the firm. Further direction by the learned Single Judge in his order that the Receiver shall take possession of the business and assets of the firm from whomsoever is in possession, also does not call for any interference as it goes without saying that when the learned Single Judge directed the Receiver to take possession of the business and assets of the firm from whomsoever it may be in possession, obviously it has to be in accordance with law. It is important to notice here that though the appellants contended before us that the premises where the business of the firm was being carried out were surrendered to the owners by the managing partner and that by an independent licence agreement entered into between the owners of the premises and the appellants, the premises came in possession of the appellants on leave and licence basis, no such agreement was produced before the learned single Judge nor the said agreement is on record. Similarly in so far as the furniture of the firm is concerned, the Receiver can always retrieve it from the appellants and, if necessary, by

> terminating licence agreement allegedly executed by the managing partner. Be that as it may, we have already clarified the legal position that in compliance of the direction of the learned single Judge that Receiver shall take possession of the business and assets of the firm from whomsoever it may be in possession, the Receiver shall proceed in accordance with law.

13. It is clear from the above quoted paragraph 12, that the Appeal Court did not disturb the order passed by the single Judge. The clarification given is that the Receiver will take possession of the assets of the firm in accordance with law. So far as surrender of licence is concerned, the court observed that though it was contended that the licence was surrendered and that new licence was created in favour of the Respondent No.6, no such document was produced before the Appeal Court. Thus, the Appeal court, in my opinion, put only one rider and that according to me is already implicit in the order that the Receiver will proceed in accordance with law. It is clear from both the orders that the Respondent No.6 was before the court and it was the case of the

partners as also the Respondent No.6 that he is in possession of the business and assets of the firm and despite that the court issued a direction. So far as the power of the court to issue direction to a third party in a petition under Section 9 is concerned, the jurisdiction of the court under Section 9 is to issue direction in relation to subject matter of arbitration. The assets of the firm will always be the subject matter of dispute arising out of arbitration agreement and therefore the court has the power to make a direction in relation to assets of the firm, because they are subject matter of arbitration. Such a direction may incidentally affect a person who is not a party to the arbitration agreement.

14. So far as the reliance placed on the provisions of Clause 21 of the Partnership Deed is concerned, in my opinion, that provision can by no stretch of imagination be said to authorise one of the partners to surrender the licence without the consent of other partners. That clause provides that the partner who is acting contrary to Clause 21 will have to indemnify other partners, however, it will not take away the right of the other partners to claim

restitution. A right to claim restitution will flow from the law and Clause 21 is one of the circumstance which is to be considered by the court. The attempt on the part of the Respondents is to read Clause 21 in such a way as to give blanket power to one of the partner to act in violation of Clause 21 with the only rider that he will be liable to indemnify the other partners. In my opinion, that will not be the correct approach. Admittedly, the premises were taken on licence by the firm for the purpose of carrying on business of the firm and therefore in view of the provisions of Section 14 of the Arbitration Act, it will be the property of the firm. The learned Counsel appearing for the Respondent No.6 submitted that the licence does not create a right in the property. Therefore, licence cannot be the property of the firm. In my opinion, the licence does not create a right in the immoveable property, but it cannot be said that by itself the licence is not the property. A licence gives a person right to occupy the premises and that definitely is a property, it may not be the immoveable property. Therefore, the licence is definitely the property of the firm. Looking at the matter from any point of view and in terms of the order passed by this Court,

the Receiver is bound to take possession of that property from whomsoever found in possession.

15. So far as the provisions of Order 40 Rule 1 of CPC is concerned, in my opinion, they do not come into play at all, because there is already a finding recorded in the order dated 29-8-2006 that the surrender of licence is unauthorised and the transactions entered into by one of the partner with the Respondent No.6 are all unauthorised and have been entered into only to create difficulties in the way of the Petitioner. The clear implication is that the partner of the Respondent No.6, who is closely related admittedly to one of the partners of the firm, who has surrendered the licence is only a front and all transactions shown to have been entered into with him are sham and bogus transactions. They do not create any right in favour of the Respondent No.6, because the transactions are shown to have been entered into as per the order passed by this court only to create difficulties in the way of the Petitioner.

16. In this view of the matter, therefore, in my opinion, a direction is required to be given to the

Receiver to take possession of all assets of the firm including the premises from where the firm was carrying on its business. So far as other assets are concerned, the Receiver shall take steps to ascertain from the balance-sheet and other material as to what are the other assets of the firm and shall proceed to take possession in accordance with law. It goes without saying that even in taking possession of the premises, the Receiver shall proceed in accordance with law.

17. It appears from the report of the Receiver that the Receiver has taken possession of some of the assets of the firm which are presently stored in Tempo. There is no dispute amongst the partners that what is stored in the Tempo are assets of the firm and that they are to be sold. The Receiver, therefore, shall make temporary arrangement for storing all those assets and shall take immediate steps to sell those assets by private treaty.

18. The Receiver shall be free to put in a report, if the Receiver faces any difficulty in implementing this order.

19. At this stage a request is made on behalf of the Respondent No.6 that the direction issued to the Receiver to take possession of the premises should be stayed.

. Considering the conduct of the Respondent No.6, the Respondent No.6 is not entitled to any relief from the court which is in the discretion of the court. The request is, therefore, rejected.

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